89-1038

No._____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LUIS CARBONE

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

ON WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR

THE FIRST CIRCUIT

PETITION

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER MOTIONS FOR A NEW TRIAL UNDER RULE 33 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND §2255 CAN BE DENIED WITHOUT A HEARING WHEN BASED ON MATTERS NOT OF RECORD AND THEY RAISED TO SUBSTANTIAL ISSUES OF LAW INCLUDING ATTORNEY CONFLICT OF INTEREST, THE USE OF PERJURED TESTIMONY TO OBTAIN PETITIONER'S CONVICTION AND FINDINGS OF FACT MADE WITHOUT A RECORD BY THE COURT OF APPEALS THAT TAPE-RECORDED CONVERSATIONS IN SPANISH ARE INTELLIGIBLE.

II

WHETHER AN AGREEMENT MADE BY PETITIONER'S TRIAL COUNSEL IN THE REPRESENTATION OF A PRIOR CLIENT, WHICH STILL BOUND COUNSEL AT PETITIONER'S TRIAL, NOT TO DISCLOSE EVIDENCE NECCESARY TO PETITIONER'S DEFENSE IS AN ACTIVE OR

[illegible]

II.

WHETHER [illegible]

PETITIONER'S TRIAL [illegible]

REPRESENTATION OF A [illegible]

STILL [illegible] COUNSEL [illegible]

TRIAL, NOT TO DISCLOSE EVIDENCE [illegible]

TO PETITIONER'S DEFENSE IS AN ACTUAL [illegible]

ACTUAL CONFLICT OF INTEREST WHICH DEPRIVED PETITIONER OF HIS RIGHT UNDER THE SIXTH AMENDMENT TO THE UNDIVIDED LOYALTY AND ASSISTANCE OF COUNSEL.

III

WHETHER THE USE OF TESTIMONY TO OBTAIN PETITIONER'S CONVICTION, WHICH THE GOVERNMENT KNEW OR SHOULD HAVE KNOWN TO BE PERJURED, GIVEN BY A GOVERNMENT WITNESS ABOUT THE FACTS OF THE CASE AND ABOUT THE NATURE AND EXTENT OF HIS PLEA AGREEMENT REQUIRES A NEW TRIAL.

IV

WHETHER A U.S. COURT OF APPEALS CAN ON APPEAL MAKE A FINDING OUTSIDE THE REVIEWABLE RECORD AND IN VIOLATION OF ITS OWN RULES THAT TAPE-RECORDED CONVERSATIONS IN SPANISH ARE BOTH AUDIBLE AND INTELLIGIBLE.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

AMENDMENTS AND STATUTES

REPORTED OPINIONS

United States v. Carbone, 880 F.2d 1500 (1st Cir. 1989).

JURISDICTION OF THIS COURT

The judgement in the U.S. Court of Appeals for the First Circuit was entered on 4 August 1989. A timely petition for rehearing and suggestion for rehearing en banc were denied on 19 September 1989. On 31 October 1989 Justice William J. Brennan, Jr. granted an application for an extension of time to file this petition to and including 18 December 1989. Jurisdiction to review by certiorari the judgement of a court of appeals in a criminal case is conferred on the Court by Title 28 U.S.C. § 1254(1)

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fifth and Sixth Amendments to the Constitution of the United States, Title 28 U.S.C. §2255,

particular case ...

appeals in a ...

on the Court ...

CONSTITUTIONAL AND STATUTORY ...

This case involves the Fifth ...

Amendments to the Constitution ...

United States, Title 28 U.S.C. ...

Precedure and Rule 8 of the Rules Governing Proceedings In the United States District Courts under §2255 of Title 28, United States Code. These provisions are reproduced in the appendix.

STATEMENT OF THE CASE

Petitioner Luis Carbone moved the District Court to vacate his conviction and grant him a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure and Title 28 U.S.C. §2255. Jurisdiction for the original prosecution is vested in the United States District Courts by Title 18 U.S.C. §3231.

Petitioner based his claim for relief on matters which are almost exclusively dehors the record in the case of his original prosecution. In support of his claims he submitted a number of affidavits and local court records.

Reference is here made to those documents which are part of the record in the Court of Appeals, although they are not reproduced in this Petition.

The attack on his conviction was threefold. First, that an agreement with the Government made by his trial counsel in an earlier case did not allow counsel to bring out at petitioner's trial that a prosecution witness had a prior record of fabricating evidence. Second, that another government witness perjured himself both as to the facts of the case and as to the nature and extent of his plea agreement. Third, that the U.S. Court of Appeals for the First Circuit, in affirming petitioner's conviction on direct appeal, made an unauthorized evidentiary finding by its decision that taped conversations in the Spanish language were both audible and intelligible, without evidence on the

record to support this finding.

The District court ordered the government to respond to the motions, the petitioner replied and the District Court then denied the motions without a hearing or findings of fact with the bare statement that "It is the Court's finding that movant is not entitled to relief in the district court." See Appendix pp.__and___. In its response the government relied exclusively on the prior record and brought no evidence to meet the facts presented by petitioner which relate to matters not in the record.

Petitioner Luis Carbone had been indicted, tried and convicted in the U.S. District Court for the District of Puerto Rico on a three-count indictment charging him with a conspiracy to possess with intent to distribute, and aiding and abetting in the possesion and in the

abetting in the possesion and in the distribution of half a kilogram of cocaine. In the investigation and prosecution of the charges alleged against petitioner Carbone, two witnesses were indispensable to the Government: the indicted co-defendant Nicolás Burgos Colón (Burgos), who testified for the Government at trial, and a long-term confidential informant for the U.S. Drug Enforcement Administration, José A. Ríos (Ríos), who was called by the defense at trial and was examined as a hostile witness. The defendant was represented at trial by María H. Sandoval, Esq. and Harvey B. Nachman, Esq., an associate and partner, respectively, of the law firm of Nachman & Fernández Seín. A substancial part of the evidence to convict defendant Carbone consisted of tape recordings of conversations and of statements, whether made in court or

recorded on the tapes, admitted against the defendant as non-hearsay testimony under Rule 801(d)(2)(E) of the Federal Rules of Evidence. The Court of Appeals affirmed the conviction, U.S. v. Carbone, 798 F2d. 21 (1st Cir. 1986).

ATTORNEY'S CONFLICT OF INTEREST

The facts on which the petitioner bases his contention that he was deprived to his prejudice of the undivided loyalty of his counsel gradually became known to him after the affirmance of his conviction and became specific during the Summer and Autumn of 1987. The conflict arose from the earlier representation by Mr. Nachman of another lawyer, Scott T. Kalisch, Esq. in a drug prosecution also initiated by Rios as a D.E.A. confidential informant.

Scott T. Kalisch, was indicted in the District of Puerto Rico on 17 August 1983 by a grand jury whcih charged him with

a single count of distributing 26.3 grams (gross weight) of cocaine in violation of Title 21 U.S.C. § 841 (a) (1). (Exhibit A). By motion dated 10 November 1983 and personally signed by the U.S. Attorney for the District of Puerto Rico, the united States requested the dismissal of the indictment against Mr. Kalisch. As grounds for requesting such a dismissal, the District Attorney stated in the body of the motion:

> Pursuant to our duty to carry investigations to the maximum extent possible, in order that true justice is made and considering certain facts and circumstances that have developed during the last three weeks, it is the opinion of the United States Attorney that the best interest of justice will be served if the captioned prosecution is terminated at this time.
>
> This newly developed evidence, brought to the attention of the United States Attorney by a member of his staff, attorneys for defendat and independent parties to this prosecution, clearly justifies the action

requested.

(Exhibit B; emphasis added.). The motion to dismiss the indictment against Mr. Kalisch was granted by minute order of 14 November 1983 (Exhibit B), and by motion dated 16 November 1983 his attorney, Harvey B. Nachman, Esq., requested that the order of dismissal be clarified to expressly state that the indictment was dismissed with prejudice. That motion was also granted by minute order, dated 17 November 1983.

On June 30 1987 defendant Luis Carbone obtained the sworn statement of José Luis Nuñez López, (Exhibit D) which begins to make explicit the facts alluded to by the government when it requested the dismissal with prejudice of the indictment against Mr. Kalisch. The long and the short of it is that the case against Mr. Kalisch had been fabricated

out of whole cloth by none other than José A. Ríos, acting as a confidential informant for the D.E.A. At the time that he attracted Ríos' attention, Mr. Nuñez López was a lawyer: by his statement he confesses himself to have been a drug abuser and his prosecution and conviction for drug offenses are a matter of record. His sworn statement establishes in detail, however, that Mr. Nachman who defended both Mr. Kalisch and defendant Carbone knew that Ríos had at least on this occasion fabricated a case against another criminal defense lawyer.

The sworn statement of Francisco Dolz Sánchez, Esq. corroborates the statement made by Mr. Nuñez López and the evidence of the record in the Kalisch case. It also adds one important fact: the defendant and the Government in that case agreed not to reveal what motivated the dismissal of the indictment. (Exhibit

E). A letter from Mr. Kalisch to the undersigned attorney, dated November 30, 1987, also confirms the existence of an agreement with respect to the Kalisch case which he still prefers not to breach. (Exhibit F). And therein lies the conflict which deprived petitioner of his lawyers' undivided loyalty and adversely affected their performance on the defendant's behalf; at the time petitoner's counsel cross-examined Rios he was still activley bound not to disclose the fabricating past of a government witness--a crucial fact in petitioner's case.

PERJURY.

Shortly after trial, on 30 July 1985, defendant Carbone twice moved for a new trial on the grounds that the Government's chief witness, Burgos, had perjured himself. The Court of Appeals affirmed the denial of these motions on

the premises on which they had been determined. The Court then added that:

> This, of course, does not preclude the defendant from bringing a new motion in the District Court accompanied by a statement from Noriega that he is willing to testify and an offer of proof covering the subject matter of his testimony.

U.S. v. Carbone, 798 F.2d at 29. The sworn statement of Carlos Noriega, Esq. (Exhibit H) plainly showed Mr. Noriega will testify and that he has evidence to give which he believes would substantially affect the outcome of the fact-finding process. He will also give evidence that negates the facts on which the Court of Appeals predicated its conclusion on direct review of Carbone's conviction that since Noriega represented

[illegible]

fact-finding process [illegible]

evidence [illegible]

the Court of Appeals [illegible]

conclusions [illegible]

conviction that [illegible]

Burgos he knew that Burgos was going to perjure himself. (798 F.2d at 29).

Petitioner Carbone through his undersigned attorney made the following offer of proof to the Disctrict Court based on the study and collation of the materials available to counsel at the time that these motions were filed and which counsel has good reason to believe are facts which can be established through the testimony of Carlos Noriega, Esq.:

> a) Nicolás Burgos Colón repeatedly stated before his second arrest that he had never made a drug transaction with defendant Carbone.
>
> b) Nicolás Burgos Colón disavowed the authorship of the written statement he puportedly gave to agents of the DEA in May 1985.
>
> c) Nicolás Burgos Colón reiterated after his second arrest that he had not done any drug deal with defendant Carbone.
>
> d) Nicolás Burgos Colón

> stated that he had been made promises by Government agents that they would not prosecute his son and brother and that his own sentence would be reduced if he cooperated.

This proffered testimony relates materially to the charges on which petitioner was tried and contradicts statements made by Burgos under oath at petitioner's trial testimony when he stated, among other things, that the agreement with the Government was that the sentences in both his cases would be made to run concurrently. (T. 708-709).

Burgos denied at trial that any deal he had made with the DEA to testify against defendant Carbone included his brother and son. (T. 710-712). The affidavit of Ernesto Gil Arzola (to which were attached copies of handwritten copies of notes from Burgos to Arzola demonsstaring a great degree of closeness) confirms that Burgos had repeatedly stated, as he

had told Carlos Noriega, Esq., that he was coerced into giving an untruthful statement, under oath, against defendant Carbone because of his brother's and his son's problems. (Exhibit M).

There is other corroborative evidence that Burgos' agreement included his family. Although arrested together with Burgos by federal agents on the same drug-dealing charges, Burgos' son and brother were never prosecuted by the federal government. Both were quite successful in Commonwealth courts. His brother, Edwin Doel Burgos Colón, with two prior convictions, had one drug case against him dismissed for lack of probable cause at the request of the prosecution, and in two other drug cases he was placed on probation for two and three years to be served consecutively. His son, Nicolás Burgos Blanco, in two drug cases, was also placed on probation

for a period of three years in each case to be served consecutively; a third case was also dismissed at the request of the prosecution for lack of probable cause.

Brother and son obviously benefited from the decision made by the U.S. Government not to prosecute them in federal court for the same matters that Burgos was indicted a second time. (Exhibits N through R). Burgos himself had his own sentence reduced for "being instrumental" in the conviction of defendant Carbone. (Exhibit S and the documents identified as Docket Entries 167, 170, 171, 172 and 177 in United States v. Carbone.) These facts fit in with the statements made by Burgos to his lawyer, Carlos Noriega, and to Ernersto Gil Arzola. Every indication is that the agreement made with the Government included much more than the mere concurrence of sentences testified to by

Burgos at trial. (T.712).

There is additional evidence, obtained by the petitoner after his motions were filed in the District Court and submitted to the Court of Appeals, that shows Burgos to have perjured himself repeatedly at trial. When asked during cross-examination at petitioner's trial about his involvement in the death of one Juan Acevedo, Burgos denied it. On 2 December 1988 an accusation was presented against Burgos for the first degree murder of Juan Acevedo. Burgos immediatly pleaded guilty to a bargained reduced charge of voluntary manslaughter which included the People's statement that a minimum concurrent sentence for the reduced crime would not be oppossed. (Exhibit U). Burgos also pleaded guilty to another voluntary homicide reduced from first degree murder of which he swore he knew nought at trial. This time

the judgment bears a notation to notify the U.S. District Attorney of the result. Compared to two muders Burgos might even be excused his denial at petitioner's trial of a number of prosecutions concerning fraudulent transactions to which he also pleaded guilty. (Exhibit W).

Burgos' admission of guilt in the killing of Juan Acevedo corroborates the sworn statement made by Gil Arzola long before the murder charges were brought and filed with petitioner's moving papers in the District Court-(Exhibit M).

From the inception of Burgos' collaboration with the DEA agents, the existence of one Héctor Suárez, and insinuations of his presence at the time that Burgos allegedly carried out a drug transaction with petitioner were known to the Government. (Exhibit T: Statement of Nicolás Burgos Colón to DEA agents).

On facts which became known to the defense in the Fall of 1987 and which counsel has good reason to believe are true, counsel made the following proffer to the District Court. Were Héctor Suárez to be called to give evidence he would state that: (1) he has never been interviewed by any Government agent or lawyer with respect to this case, and (2) he has evidence to give which would controvert the evidence offered at trial by Burgos, which new evidence would be favorable to the defendant.

The fact that the Government did not bother to interview Mr. Héctor Suárez compounds the Government's abdication of its control over this investigation to a known fabricator, Ríos, and to Burgos over whom it then held the Damoclean power to indict, and the power to indict his son an his brother. The Government must have also known from Burgos that it

did not want to interview Mr. Suárez because that would have produced evidence which the Government would then be compelled to disclose to the defendant as exculpatory. It is a violation of the defendant's right not to be deprived of liberty without the due process of law for the Government to abdicate its prosecutorial responsibilities on Ríos and Colo Burgos and to fail to investigate so as to evade its obligation to disclose exculpatory evidence.

The Spanish Speaking Court. In affirming the petitioner's conviction on direct appeal, the Court of Appeals dealt with the tapes of Spanish language conversations by first finding that the transcripts (in Spanish with parallel English translations) were improperly authenticated, 798 F2d at pp.26-27, and playing the Spanish language tapes to

find that "[...] none of them were so inaudible or unintelligible as to make them more misleading than helpful."

No explanation was given to justify this new-found linguistic expertise in the Court of Appeals, whose rules forbid the use of any language other than English. This was all the more unfair to the petitioner because the tapes are riddled with "inaudibles" -hundreds of them- and the testimony of the government's witnesses frequently provided a fuller or different version of the same conversations--easily confusing the jury about what they had heard on the tapes and what they had heard from a witness

REASONS FOR ALLOWANCE OF THE WRIT

This Court has time and again held that a hearing must be held when a habeas petition or a §2255 motion raises matters which if proved would warrant relief.

In this case, in the face of abundant law to the contrary the District Court declared itself without power to act. And the Court of Appeals affirmed such an unfounded disclaimer by ignoring and misstating the facts or misconstruing petitioner's claims. The judgment of the Court of Appeals is in conflict with applicable decisions of this Court. Rule 17.1(c) of the Rules of this Court. The Court of Appeals also "[...] so far departed from the accepted and usual course of judicial proceedings", Rule 17.1(a), in reaching the decision to affirm the denial of petitioner's motions that this Court should exercise its power of supervision.

NEED FOR AN EVIDENTIARY HEARING

An evidentiary hearing must be held to determine factual issues raised by the petitioner on a §2255 motion especially when the trial record will not be of much

use Machibroda v. United States, 368 U.S. 487 (1962); Ladner v United States, 358 U.S. 169, 179 (1958), citing United States v. Hayman, 342 U.S. 205, 219-220 (1952) and Walker v. Johnston, 312 U.S. 275 (1958):

> Not by the pleadings and the affidavits, but by the whole of the testimony, must it be determined whether the petitioner has carried his burden of proof and shown his right to a discharge. The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard.

Walker v. Johnston, 312 U.S. at 287, (emphasis added), as quoted in Machibroda, 368 U.S. at 495.

The standard by which the District Court must measure the quantum of evidence is fixed by the statute, and has been repeatedly stated by this Court to be that, the court must conclude that "under no circumstances could the petitioner establish facts warranting

relief under §2255", Fontaine v. United States, 411 U.S. 213, 215 (1973) (emphasis added). This standard was taken for granted in Sanders v. United States, 373 U.S. 1, 6-7 (1963).

Precisely on point is De Marco v. United States, 415 U.S. 449 (1974). The defendant was convicted by use of the testimony of a government witness who had been indicted with De Marco and who had "testified that the Goverment had made no promise to him with respect to the disposition of his case." 415 U.S. at 449. De Marco learned during the pendency of his appeal that the witness had pleaded "to a lesser charge contained in a superseding indictment; and at his sentencing hearing, the United States Attorney made certain statements that petitioner interpreted as proving that promised had been made to the witness prior to his testimony and that the

witness had testified falsely at petitioner's trial". Ibid. The issue was tendered to the Court of Appeals for the first time by De Marco and adversely decided against him. This Court concluded that "The issue should have been remanded for initial disposition in the District Court after trial." Ibid. Burgos obtained a reduction of his sentence in federal court because he had been "instrumental" in convicting Carbone, his family was exempted from federal prosecution, he has been incredibly well treated by the local courts, which at least on one occassion noted the need to notify the U.S. District Attorney. All of it contrary to his trial testimony.

Longstanding doctrine in the First Circuit requires that the facts alleged in a motion under Title 28 U.S.C. §2255 must be taken as a true by the district

[illegible]

[illegible] to his trial testimony.

Longstanding precedent [illegible] Circuit requires that the facts alleged in a motion under Title 28 U.S.C. § 2255 must be taken as a true by the district

court except to the extent that they are contradicted by the record or are inherently incredible. Otero v. United States, 494 F2d 900 (1st Cir 1961). Only then can a district court deny a hearing on a §2255 motion when the court's discretion is correctly exercised on those accepted facts United States v. Fournier, 594 F2d 276 (1st Cir. 1979). This was true even when the district court made findings about matters occuring in its presence. Mack v. United States, 635 F2d 20 (1st Cir.1980). A hearing can only be denied where the motion is facially inadequate or conclusively refuted by the files and records of the case. Moran v. Hogan, 494 F2d 1220 (1st Cir. 1974). Even a speculative allegation which if true would warrant relief calls for a hearing. De Vincent v. United States, 602 F2d 1006 (1st Cir. 1979).

For no apparent reason such standards are not applicable in this case. The district court made only one determination in this case: "It is the court's finding that movant is not entitled to relief in the district court." Appendix pp.___and___. What makes the affirmance of the judgment in this case an egregious departure from precedent is that the matters alleged in appellant's papers are not refutable by the records of the case because quite simply they happened out of court. The only way to dispose of the factual allegations in this case without a hearing is to ignore well pleaded facts and to incorrectly characterize the claims predicated on those facts, as the Court of Appeals did.

CONFLICT OF INTEREST UNDER THE SIXTH AMENDMET

Petitioner does not claim that the cross-examination of José Ríos was not "vigorous and well within the range of competence required of defense counsel in criminal cases." Appendix pp. __and __. The claim is that the cross-examination stopped short of bringing before the jury the crucial fact that José Ríos was known by trial counsel and the Government to have fabricated out of whole cloth another drug case. Thus the character of the informant who "gathered the evidence" (T.800) for this prosecution was not placed before the jury because the petitioner's trial counsel could not breach an agreement with the Goverment not to disclose Ríos' fabricating past--an agreement made for the benefit of a prior client.

The existence and extent of the agreement (persisting through

petitioner's trial to the present) are nowhere refuted in the trial record. Nor did the Government offer any affidavit to controvert the fact alleged by petitioner in his motions although the U.S. District Attorney who participated in the agreement is still in office. Contrary to the Court of Appeals' unexplained finding, "nor was alleged conflict an active conflict of interest [,]" Appendix pp.___, there was an active or actual conflict as required by Cuyler v. Sullivan, 446 U.S. 335 (1979) and Strickland v. Washington, 466 U.S, 668 (1984).

The Court of Appeals nexts holds that no prejudice resulted because "'[t]he evidence against defendant was overwhelming; he was convicted out of his own mouth.' 798 F2d at 29. Rios' testimony was only part of a strong case against defendant." Appendix p.___.

This repetition of the conclusion reached on the direct appeal of petitioner's conviction, United States v. Carbone, 798 F2d 21 (1st Cir. 1986) again ignores the effect on the equation of Rios' ability and willingness to fabricate evidence. That he gathered evidence including some of the tapes is beyond dispute. That the tapes are riddled with hundreds of unaudibles is also not disputable. It is surely a "reasonable probability" that a "factfinder would have had a reasonable doubt respecting guilt []" Strickland, 466 U.S. at 695, when both witness and tapes are placed in fabricating perspective.

THE LAW OF PERJURED TESTIMONY

To avoid a direct clash with precedent on the perjury issue, the Court of Appeals mischaracterizes the evidence of perjury as a "recantation". Appendix p.___ Burgos has not recanted his

testimony, he has quite simply admitted to various persons that he lied at trial about the facts of the case because contrary to his sworn testimony he never made a deal with Carbone. The evidence petitioner has gathered is of confidences made to erstwhile friends and admissions forced out of him under cross-examination in other cases.

Lies about a plea agreement require a new trial, Naoue v. Illinois, 360 U.S. 264 (1959) and an evidentiary hearing is required on such a dispositive factual issue, De Marco v. United States, 415 U.S. 449 (1974). And quite obviously if Burgos did not state the true extent of the agreement he made with the Government in the presence, at trial, of the prosecutor and the agent who obtained and witnessed his "confession" at the time Burgos decided to become a prosecution witness, then the Government

can be fairly charged of letting false testimony go uncorrected. In Giglio v. United States, 405 U.S. 150, 154 (1972) this Court established the inivisible unity of the prosecution for these purposes: "[...] whether the nondisclosure was a result of negligence or design, it is the responsibility of the prosecutor. The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."

It is factually incorrect to state that no "specific offer of proof covering the subject matter" of Mr. Noriega's testimony was made. The offer was made as quoted here, ante pp.___, and quoted in the petitioner's brief in the Court of Appeals. Such a denial of reality is hard to explain in a judicial opinion.

The petitioner cannot compel Mr.

[illegible]

It is factually [illegible]

[illegible]

decisions [illegible]

as quoted here [illegible]

in the petitioner's [illegible]

of Appeals. Such a denial of [illegible]

hard to explain in a judicial [illegible]

The petitioner cannot compel [illegible]

Noriega's testimony without a hearing and the resolution of his claim of privilege. At oral argument the petitioner called the court's attention to United States v. Long, 857 F2d 436 (8th Cir.1988) with respect to the administration of the rule in Nix v. Whiteside, 475 U.S. 157 (1986). Mr. Noriega's assertion of attorney-client privilege is far from frivolous but it certainly deprives the petitioner of his sworn testimony unless a hearing is held.

The Language of Federal Courts.

Finally, the Court of Appeals misapprehends the appellant's claim that it made an unauthorized evidentiary finding during his first appeal. Even conceding arguendo that one could make a determination about what is an audible conversation in a language one does not understand, it is logically quite impposible to make a fingding that a

conversation is intelligible in a language one does not understand. And with deference we must insist that it is not legal for the Court of Appeals to understand Spanish. That Court relied again and again on the evidence of the tapes. Which the Court heard in Spanish? Which the Court can only understand from English translations of improperly authenticated transcripts? 798 F2d at 26-27.

The Court of Appeals cannot, in violation of its own rules which require that proceedings be conducted in English, make a finding that Spanish language conversations are intelligible without any evidence in the record to be reviewed. To suit its purposes the Court of Appeals again misstates the issue by pretending that the issue is audibility and not inteligibility.

In United States v. Benmuhar, 658 F.2d 14,20, (1st Cir. 1981) the Court held the use of the English language in federal court proceedings to be "significant". This was enough to defeat a claim by the defendant that the use of an "English proficiency requirement does operate in a 'systematic' manner[]" within the meaning of Duren v. Missouri, 439 U.S 357 (1979) to deprive the defendant of having a jury selected from a fair cross section of the population. 658 F.2d at 19. One of the reasons expressed by the Court to show the validity of the Government's argument that the use of the national language manifestly and primarily advances a significant state interest, 658 F.2d at 19, was that: "Possible translation distortions in indictments and complaints based on statutes written in English are avoided,

as they are again during appellate review." 658 F.2d at 20; emphasis added; citing generally to United States v. Valentine, 288 F. Supp. 957, 964-65 (P.R. 1968).

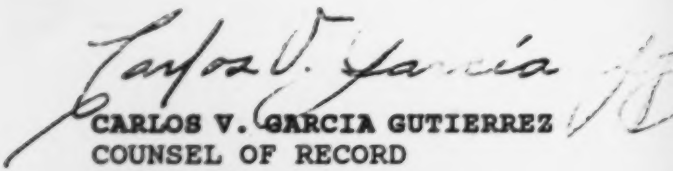
The admittedly vexing issues raised by an English speaking court system which operates in a Spanish speaking community, must not result in the denial to an appealing defendant of his statutory right to efficient review of his conviction and thereby of his rights to the due process of law and the equal protection of the laws as guaranteed by the Fifth Amendment.

Respectfully submitted at San Juan, Puerto Rico for Washinton D.C. this 18th day of December 1989.

PROOF OF SERVICE

I hereby certify that on 18 December 1989 I have served this Petition on Respondent the United States by mailing

thru true and exact copies hereof to Kenneth W. Starr, Esq., Solicitor General, U.S. Department of Justice, 20530. The United States is the only party to be served.



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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1668
No. 88-1756

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

v.

LUIS CARBONE,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF PUERTO RICO

[Hon. Juan R. Torruella,* U.S. Circuit Judge]

Before

Breyer and Selya, Circuit Judges,

and Caffrey,** Senior District Judge.

Carlos V. Garcia Gutierrez for appellant.
Jorge E. Vega-Pacheco, Assistant United States Attorney, Criminal Division, with whom Jose A. Quiles, Acting United States Attorney, was on brief for the United States.

AUGUST 4, 1989

*Of the First Circuit, sitting by designation.
**Of the District of Massachusetts, sitting by designation.

CAFFREY, Senior District Judge. Defendant Luis Carbone appeals from the district court's denial of his motions for post-conviction relief under Fed. R. Crim. P. 33 and 28 U.S.C. § 2255. Carbone was convicted by a jury of conspiracy with intent to distribute cocaine in violation of 21 U.S.C. § 846, aiding and abetting in the possession of half a kilogram of cocaine with intent to distribute it, and aiding and abetting in the distribution of half a kilogram of cocaine in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. The conviction was affirmed by this Court in United States v. Carbone, 798 F.2d 21 (1st. Cir. 1986).

In addition to arguing that the district court erred in denying his request for a new trial on the basis of newly discovered evidence and an alleged "unauthorized evidentiary finding" by

this Court, defendant argues that the court should at least have held an evidentiary hearing before ruling on the motions. Given that we are not persuaded by defendant's arguments, we affirm.

First, defendant argues that a new trial is in order because newly discovered evidence establishes that he was deprived of effective assistance of counsel in violation of the sixth amendment of the United States Constitution. Defendant contends that his attorney did not pursue viable defenses available to Carbone because of a conflict of loyalties in his representation. He claims that his attorney abandoned an in-depth cross-examination of Jose Ríos, a government informant, due to an earlier agreement the attorney had entered into with the government involving Rios' role in another drug prosecution case. There is

no indication in the record, however, that the alleged conflict of interest adversely affected defense counsel's performance in cross-examining Rios, nor was the alleged conflict an active conflict of interest. See Cuyler v. Sullivan, 446 U.S. 335, 350 (1979) (prejudice is presumed only where the defendant establishes that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected the lawyer's performance). Defendant is therefore required to show that his attorney's performance fell below and objective standard of reasonableness and that there is a reasonable probability that but for this ineffective assistance the outcome of the trial would have been different. See Strickland v. Washington, 466 U.S. 668, 687-94 (1984) (the appropriate standard for attorney performance is that

of reasonably effective assistance and the challenging party must demonstrate prejudice).

We find no abuse of discretion in the district court's determination that defendant is not entitled to a new trial on the basis of ineffective assistance of counsel. Carbone has been unable to show that his attorney's performance in cross-examining Rios fell below and objective standard of reasonableness. The transcript indicates that such cross-examination was vigorous and was well within the range of competence required of defense counsel in criminal cases. Furthermore, defendant is unable to establish by a long shot that there is a reasonable probability that but for the alleged ineffective assistance the outcome of the trial would have been different. As this Court explained in the earlier affirmance, "[t]he evidence

against defendant was overwhelming; he was convicted by the words out of his own mouth." 798 F.2d at 29. Rio's testimony was only a part of a strong case against defendant. Defendant's challenge on this basis fails to satisfy both of the requirements set forth in Strickland. The district court did not abuse its discretion in rejecting this challenge.

Second, defendant also argues that a new trial should be granted based on newly discovered evidence uncovering the alleged perjury of Burgos Colon, one of the government's key witnesses at trial. Carbone alleges that there is substantial evidence that Burgos lied when he testified that he sold half a kilogram of cocaine to Carbone. According to defendant, Burgos told a fellow inmate at the Commonwealth Penitentiary at Rio Piedras that he had never entered into a drug transaction with defendant.

Defendant has also provided this Court with a supplemental offer of proof regarding the alleged perjury of Burgos at trial on the subject of his plea agreement which provided for his testifying against Carbone. For purposes of this appeal, we allow the defendant's related motion to supplement the record. We conclude, however, that the district court's denial of defendant's request for a new trial should not be disturbed.

Given that defendant has alleged that Burgos' testimony implicating defendant in the drug transaction was perjured, the applicable analysis is arguably the test describe in Larrison v. United States, 24 F.2d 81, 87 (7th Cir. 1928). See United States v. Wright, 625 F.2d 1017, 1020 (1st Cir. 1980) ("[W]e have suggested that the rule is applicable in cases in which the new evidence demonstrates that the testimony in

question was deliberately false."). Under Larrison, the threshold for granting a new trial is that "the trial judge be satisfied that the testimony was perjured." Id. at 1020. It is well established that recantations are generally viewed with considerable skepticism. Pelegrina v. United States, 601 F.2d 18, 21 (1st Cir. 1979); United States v. DiCarlo, 575 F.2d 952, 961 (1st Cir.) cert. denied, 439 U.S. 834 (1978).

In the present case, there is substantial cause to disbelieve Burgos' alleged recantation. Burgos' testimony at trial was consistent in all material respects with the recorded conversations admitted into evidence and testimony provided by other government witnesses. As this Court explained earlier, "our review of the evidence indicates it was highly unlikely that Burgos' testimony was false. If Burgos committed perjury,

then the recorded conversations of the other indicted defendants ...had to be not only false, but part of a deliberate and calculated scheme. This borders on the incredible." 798 F.2d at 29 (footnote omitted). We see no reason to disturb the district court's implicit determination that Burgos' testimony at trial was not perjured. After examining this "newly discovered evidence," we conclude that there is no abuse of discretion in the ruling of the district court.

Defendant's supplemental offer of proof regarding Burgos' alleged perjury at trial as to the nature of his plea agreement raises an issue of impeachment evidence. Though impeachment evidence may be significant in a close case, this was by no means a close case. Such evidence is deemed to be immaterial at this juncture and cannot serve as grounds

for a new trial under Fed. R. Crim. P. 33.

Third, defendant argues that it was error for the district Court not to conduct and evidentiary hearing before ruling on the post-conviction motions. A hearing is not necessary in cases where a § 2255 motion "(1) is inadequte on its face, or (2) although facially adequate, is conclusively refuted as to the alleged facts by the files and records of the case." Moran v. Hogan, 494 F.2d 1229, 1222 (1st Cir. 1974). Defendant's request for a new trial is inadequate for two reasons: 1) Carbone has failed to make a specific offer of proof covering the subject matter of Attorney Noriega's testimony, and 2) the supplemental offer of proof refers to immaterial impeachment evidence.[1]

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1 We note that at the time of Carbone's initial apeal this Court mentioned the possibility of his filing a new motion in the district court "accompanied by a statement from Noriega that he is

Furthermore, the allegations of ineffective assistance of counsel and Burgo's perjured testimony implicating Carbone are conclusively refuted by the files and records of the case. An evidentiary hearing was, therefore, not required.

Fourth, Carbone challenges this Court's earlier review of the audibility of the tape recordings submitted at trial as an "unauthorized evidentiary finding" by an appellate court. Defendant argues that

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willing to testify and an offer of proof covering the subject matter of his testimony." 798 F.2d at 29. The June 25, 1987 sworn statement by Noriega, Burgos' former attorney, which was filed as an exhibit to defendant's § 2255 and Rule 33 motions does not provide a specific offer of proof covering the subject matter of his testimony. The statement merely provides a conclusion, which cannot serve as a basis for a hearing on the motions: "I have information which, if know to the trier of fact, I believe would substantially affect and probably change the outcome of the fact-finding process." Defendant's Motions For a New Trial, Exhibit H at ¶ 2. Bald conclusions are no substitution for specific factua allegations necessary to supprot the applicant's claim. Seil-

he is entitled to a new trial on this basis. Without addressing the issue of whether defendant can properly raise such a challenge at this juncture, we fail to see any merit in defendant's argument. This Court played all of the tapes at the time of defendant's earlier appeal and concluded "that none of them were so inaudible or unintelligible as to make them more misleading than helpful." 798 F.2d at 25. Defendant had claimed, among other things, that some of the tapes were inaudible and therefore should not have been admitted into evidence. In reviewing the tapes, this Court was obviously mindful of defendant's request at that time that the Court listen to the tapes to determine whether the district Court had abused its discretion in

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ler v. United States, 544 F.2d 554, 567-68 (2d Cir. 1975); Moran v. Hogan, 494 F.2d at 1222.

allowing the tapes to be played to the jury. Other circuits similarly have not hesitated to play such recordings in reviewing a district court's evidentiary ruling for abuse of discretion. See e.g., United States v. Kabot, 295 F.2d 848, 853 (2d Cir. 1961) ("This Court has listened to the recording. The recording was, however, largely unintelligible due to background noises."); Cape v. United States, 283 F.2d 430, 435 (9th Cir. 1960) ("We have listened to the recording carefully; although some portions are unintelligible, many significant parts are not.").

Accordingly, the district court's judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1756

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

v.

LUIS CARBONE,
Defendant, Appellant.

JUDGMENT

ENTERED: AUGUST 4, 1989

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows:

The judgment and order of the district court are affirmed in accordance with the opinion issued this day.

By the Court,

FRANCIS P. SCIGLIANO
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 88-1668
No. 88-1756

UNITED STATES OF AMERICA,
Plaintiff, Appellee,

v.

LUIS CARBONE,
Defendant, Appellant.

Before

Campbell, Chief Judge,
Bownes, Breyer, Torruella* and Selya
Circuit Judges, and Caffrey**
Senior District Judge

ORDER OF COURT

Entered: September 19, 1989

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing in these cases and the suggestion for the holding of a rehearing en banc in these cases having been carefully considered by the

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*Judge Torruella is recused.

**Of the District of Massachusetts, sitting by designation

judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc in these cases be and the same hereby are denied.

By the Court:

FRANCIS P. SCIGLIANO

Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA :

Plaintiff :

v. : CRIMINAL NO.84-395 (TR)

LUIS CARBONE aka "LUIGUI":

Defendant :

LUIS CARBONE :

Plaintiff :

v. : CIVIL NO. 88-281(TR)

UNITED STATES OF AMERICA :

Defendant :

O R D E R

Plaintiff Luis Carbone moves under 28 U.S.C. § 2255 for a new trial, or in the alternative, for a hearing pursuant to Rule 8 of the Rules Governing Section 2255 Proceedings in the United States District Courts. The government filed a Response opposing the Motion in its entirety, to which Carbone replied.

The court has carefully reviewed all the papers and supporting affidavits, and has reexamined the transcripts and exhibits of the prior proceedings.

It is the court's finding that the movant is not entitled to relief in the district court. The motions are therefore dismissed.

IT IS SO ORDERED.

At San Juan, Puerto Rico, this May 24, 1988.

[Signed]
JUAN R. TORRUELLA
U.S. CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA)

Plaintiff)

v.) CRIMINAL NO.84-395 (TR)

LUIS CARBONE aka "LUIGUI")

Defendant)

LUIS CARBONE)

Plaintiff)

v.) CIVIL NO. 88-281(TR)

UNITED STATES OF AMERICA)

Defendant)

A M E N D E D O R D E R

Plaintiff Luis Carbone moves under 28 U.S.C. § 2255 and under Fed. R. Crim. P. 33 for a new trial, or in the alternative, for a hearing pursuant to Rule 8 of the Rules Governing Sectin 2255 Proceedings in the United States District Courts. The government filed a Response opposing the Motion in its entirety, to

which Carbone replied.

The court has carefully reviewed all the papers and supporting affidavits, and has reexamined the transcripts and exhibits of the prior proceedings.

It is the court's finding that the movant is not entitled to relief in the district court. The motions are therefore dismissed.

IT IS SO ORDERED.

At San Juan, Puerto Rico, this 30th day of June, 1988.

[Signed]
JUAN R. TORRUELLA
U. S. CIRCUIT JUDGE

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which

district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

§ 2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear

appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or

ineffective to test the legality of his detention.

Rule 8. Evidentiary Hearing

(a) Determination by court. If the motion has not been dismissed at a previous stage in the proceeding, the judge, after the answer is filed and any transcripts or records of prior court actions in the matter are in his possession, shall, upon a review of those proceedings and of the expanded record, if any, determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the motion as justice dictates.

(b) Function of the magistrate.

(1) When designated to do so in accordance with 28 U.S.C. § 636(b), a magistrate may conduct hearings including evidentiary hearings, on the motion, and submit to a judge of the court proposed findings and recommendations for

disposition.

(2) The magistrate shall file proposed findings and recommendations with the court and a copy shall forthwith be mailed to all parties.

(3) Within ten days after being served with a copy any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

(4) A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify in whole or in part any findings or recommendations made by the magistrate.

(c) Appointment of counsel; time for hearing. If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C.

§ 3006A(g) and the hearing shall be conducted as promptly as practicable, having regard for the need of counsel for both parties for adequate time for investigation and preparation. These rules do not limit the appointment of counsel under 18 U.S.C. § 3006A at any stage of the proceeding if the interest of justice so requires.